SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-170
District Docket No. XIV-07-185;
XIV-07-186E; and XIV-07-187E

IN THE MATTER OF	:	
ANDREW M. KIMMEL	:	
AN ATTORNEY AT LAW	:	Dissent

Argued: July 17, 2008

Decided: September 25, 2008

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter involves, among other things, an allegation that Andrew Kimmel, Esq., knowingly misappropriated client funds by borrowing $30,000 from an estate for which he was serving as executor and trustee. The conclusion of the majority of the Board that this was a knowing misappropriation in violation of RPC 8.4(c) and In re Wilson, 81 N.J. 479 (1979), is pivotal to its decision to recommend disbarment. We do not agree that the

evidence of a knowing misappropriation is clear and convincing and, therefore, respectfully dissent.

A knowing misappropriation requires clear and convincing proof that the attorney is guilty of (1) "taking the client's money entrusted to him"; (2) "knowing that it is the client's money"; and (3) "knowing that the client has not authorized the taking." In re Noonan, 102 N.J. 157, 160 (1986). It is this third indispensable element that we find missing from the record. The evidence just as readily suggests that Mr. Kimmel had a good faith – though erroneous – belief that the terms of the will and the statutory powers granted to fiduciaries gave him the authority to loan money from the estate to anyone, including himself. Under our case law, that is a viable defense. See In re Cotz, 183 N.J. 23 (2005) (no finding of knowing misappropriation where attorney reasonably, though mistakenly, believed that he had sufficient monies in his trust account to fund a disbursement); In re Rogers, 126 N.J. 345 (1991) (no finding of knowing misappropriation based on mistaken but good faith belief that attorney's use of trust funds was authorized by the owner).

The question is whether Mr. Kimmel *knew* that making the loan was unauthorized, not whether he should have known. As the Supreme Court said in In re Barlow, 140 N.J. 191, 196 (1995):

> We have been. . . resolute in requiring proof of respondent's state of mind by clear and convincing evidence. Proof of misappropriation, by itself, is insufficient to trigger the harsh penalty of disbarment. Rather, the evidence must clearly and convincingly prove that respondent misappropriated client funds knowingly.

See In re Goldstein, 116 N.J. 1, 5 (1989) (OAE failed to prove by clear and convincing evidence that attorney knowingly misappropriated interest from trust fund when evidence showed he was unaware that it was improper); In re Hollendonner, 102 N.J. 21, 29 (1985) (OAE failed to prove by clear and convincing evidence that attorney invaded escrow funds with knowledge that the use of the funds was improper); see also In re DiLieto, 142 N.J. 492 (1995) (knowing misappropriation not proved where attorney obtained client's consent to loan money, but failed to disclose to client that loan was to the attorney himself).

The requisite knowledge is not always easy to show, and cannot be presumed. "Proving a state of mind – here, knowledge – poses difficulties in the absence of an outright admission." In re Johnson, 105 N.J. 249, 258 (1987). Circumstantial evidence in a particular case may clearly and convincingly show that an attorney knew the use of client funds was unauthorized. Id. However, the OAE did not offer any compelling evidence that Mr. Kimmel knew the loan was unauthorized. To the contrary, the OAE never directly addressed Mr. Kimmel's testimony (and

argument) that he honestly believed he had the authority to make the loan. Neither did the special master.[1]

The relevant facts are simple and straightforward. Mr. Kimmel drafted the Last Will and Testament of Dr. Emanuel Richter, a client and friend, in October 1995. Mr. Kimmel was appointed both the executor of the Will and the trustee of the trust established by the will for the benefit of the testator's adult son. Dr. Richter died on April 23, 2000, and the will was promptly probated.

Several years later, around March 22, 2004, Mr. Kimmel made a $30,000 loan to himself from the estate. He used the loan to buy a car. Mr. Kimmel formalized the loan with a signed promissory note, payable on demand, and bearing interest at an annual rate of nine percent. He put the note in the estate file. Mr. Kimmel repaid the note, together with interest, in seventeen monthly installments, each in the amount of $2,000. These payments began on December 1, 2004, and ended on March 5, 2006. Mr. Kimmel neither sought nor received approval for the loan from the beneficiary of the estate.

Mr. Kimmel testified that he believed he was authorized to invest the estate property, such as through an interest-bearing

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[1] See "Findings of Fact and Recommendations of Special Ethics Master," at 3-4.

loan, both by the terms of the will and by the powers granted to fiduciaries by New Jersey statute.[2] Specifically, Article Twelfth of the will grants certain powers:

> In addition to, and without limiting, any powers and authority which are granted to or vested in my Executors by any of the other Articles of this Will or by law, I authorize my Executors, in investing, managing, and administering the estate, or any fund held hereunder, in their absolute discretion: . . . to invest and reinvest in any property whether or not such property shall be authorized by the laws of any jurisdiction for the investment of funds or estates or trusts.

In the same paragraph, the will grants to the trustee the power to

> dispose of any property, at such time or times, and upon such terms and conditions, including terms of credit, with or without security, as they shall deem advisable; and in general, to exercise, personally or by attorney, any and all rights and powers which might be exercised by an absolute owner of any property at any time held under this Will, all at such times, and in such manner and on such conditions as they shall deem advisable.

Mr. Kimmel also cites N.J.S.A. 3B:14-23(c), which grants a trustee power:

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[2] That Mr. Kimmel was the draftsman of the will should not raise any additional doubts about the propriety of the subsequent loan. It seems unlikely that Mr. Kimmel would have carefully structured the will in 1995 with language granting the executor and trustee broad powers over the trust property with an eye toward authorizing a loan to himself at some indeterminate future date – as it turned out, nine years later.

> To invest and reinvest assets of the estate or trust under the provisions of the Will... and to exchange assets for investments and other property upon terms as may seem advisable to the fiduciary.

N.J.S.A. 3B-14-23(u), in turn, grants the trustee power "to acquire. . . an asset, including. . . personal property. . . for cash or credit. . . ." Mr. Kimmel cites all of these provisions to argue that he was expressly authorized to loan himself money from the estate.

Mr. Kimmel is quite simply wrong. The language he cites at most *implies* authority to make loans to the executor or trustee. There is no express language to that effect; nothing in the will comes close to an explicit "authorization" to loan money to himself.

Mr. Kimmel was either knowingly unethical or spectacularly misguided. The problem is that

> the evidence about respondent's state of mind is no more compelling in the direction of knowledge than it is in the direction of unhealthy ignorance; and before we will disbar on the basis of a lawyer's knowing misappropriation, the evidence of that knowledge must be clear and convincing.
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> [In re Johnson, supra, 105 N.J. at 258.]

That making a loan to himself was so clearly inappropriate for an attorney or other fiduciary arguably allows an inference that Mr. Kimmel must have known it was unauthorized. But we do

not think that such an inference alone is clear and convincing proof in this case. Mr. Kimmel testified that he firmly believed he was authorized to make the loan, and he offered some justification for his belief. If anything, the circumstances tend to support his testimony. The language of the will does grant the executor "absolute discretion" to do anything an "absolute owner" of the property could do – including making loans, at least to a true third party. Moreover, Mr. Kimmel made no effort to hide the loan from the OAE or others. He documented the loan with a formal promissory note. He openly kept the note evidencing the loan in the estate file. Mr. Kimmel began repaying the loan and interest well before the OAE began investigating him on the unrelated grievance by the beneficiary. In short, Mr. Kimmel did not do anything furtive that would have suggested a consciousness that the loan was improper.

This seems to be one of the rare cases where a lawyer can credibly argue that he or she honestly believed the use of client funds was authorized, even when it was not. Here, the evidence does not rise to the required clear and convincing proof of a knowing misappropriation.

There is no question that Mr. Kimmel's troubling actions fell short of the Rules of Professional Conduct. Had the OAE

charged Mr. Kimmel with other violations based on the loan, we would have had no quarrel finding such violations and agreeing to an appropriate sanction. But that is not what the OAE did.[3] Furthermore, RPC 1:20-4(b) prohibits finding a violation not alleged in the complaint.

However, misappropriation is not the sole issue here. We agree with the special master that there is clear and convincing proof that Mr. Kimmel violated:

> 1) RPC 1.1(a)(gross neglect) and RPC 1.3 (lack of diligence) by failing to deposit checks and stock dividends and by failing to transfer stock certificates into the estate;
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> 2) RPC 1.5(a) (excessive fees) in that a portion of the fees charged by Mr. Kimmel was excessive and not fully documented;
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> 3) RPC 1.15(b) (failure to remit funds to a third party) by failing to pay the bequest to Hadassah Medical Relief Association;
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> 4) RPC 3.3(a)(1) (candor to a tribunal) and RPC 8.1(b) (failure to cooperate with ethics authorities) by falsely claiming he was too ill to cooperate with ethics authorities while he had appeared pro se in court and at his office just days before;

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[3] *See* OAE Complaint, Count Two, allegations include "Knowing Misappropriation of Trust Fund". This may be another example that reasonable and experienced minds can disagree where the line falls between intentional and negligent misappropriation. See, e.g., In re Shelly, 140 N.J. 501 (1995) (Special Master found misappropriation to be knowing, DRB agreed by a five to three vote, Supreme Court disagreed and found misappropriation was negligent but not intentional); In re Roth, 140 N.J. 430 (1995) (Special Master found misappropriation was not knowing, DRB found by five to three that it was knowing, and Supreme Court split six to one for disbarment).

5) RPC 8.4(d) (conduct prejudicial to administration of justice) by contacting Maureen Maimone and her son in violation of a temporary restraining order; and

6) RPC 1:20-20 (rules governing suspended attorneys) by failing to submit the appropriate affidavit.

Based on these violations, which are aggravated by Mr. Kimmel's past history of ethics violations, we conclude that a substantial suspension with appropriate conditions for reinstatement is necessary to protect the public interest. We would recommend suspension for two years, with reinstatement conditioned on certification of fitness by a mental health professional acceptable to the OAE. See, e.g., In re Weiner, 185 N.J. 468 (2006) (two-year suspension for unethical conduct in two client matters involving gross neglect, lack of diligence, failure to keep the client reasonably informed, charging an unreasonable fee, failure to turn over the client's file on withdrawal, misrepresentation to the client, and failure to cooperate with disciplinary authorities; default matter; prior private reprimand, reprimand, six-month suspension, and temporary suspension); In re Bentivegna, 185 N.J. 244 (2004) (on a motion for reciprocal discipline, attorney suspended for two years for misconduct in four matters; the attorney charged excessive fees, made misrepresentations to a client, an adversary, and a court, and wasted judicial resources by forcing

the courts to conduct hearings to determine the validity of documents that she had no authority to sign or file).

Although, unlike Weiner, respondent did not default in the disciplinary matter and, unlike Bentivegna, his conduct did not encompass four client cases, the totality of the circumstances, namely, the seriousness of his overall conduct and his history of ethics infractions, warrants the imposition of the same term of suspension received by those two attorneys.

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